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OCTOBER TERM, A. D. 1901.

Filed Oct. 28, 1901.

ALFRED V. BOOTH, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE
OF ILLINOIS.

Brief and Argument for Defendants in Error.

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Attorney General of Illinois

ELBERT S. SMITH,
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Supreme Court of the United States.

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v/s.

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Brief and Argument for Defendants in Error.

BRIEF.

The statute of Illinois declares :

“Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market or attempts to do so in relation to any of such commodities shall be fined,” &c.

Rev. Stat. Ill., Crim. Code, par. 130.

The legislature of Illinois has full power to pass any laws where not restricted by the provisions of the State or Federal Constitution.

The power of the legislature to pass police regulations is not restricted by any constitutional limitation.

Slaughter-house cases, 16 Wall., 36.

Barbier *vs.* Connolly, 113 U. S., 32.

Mugler *vs.* Kansas, 123 *id.*, 623.

The police power is the general power of the Government to protect and promote the public welfare, *even at the expense of private rights.*

Beer Co. *vs.* Massachusetts, 97 U. S., 25.

Am. & Eng. Encyc. of Law—"Police power."

The police power extends not only to the right to prohibit gambling, but also to prohibit those acts which may be used as disguises for unlawful practices and so have a tendency to injure public interests and degrade the public welfare.

Tiedeman on Lim. of Police Power, see. 99a.

Schneider *vs.* Turner, 130 Ill., 28.

Tenney *vs.* Foote, 4 Ill. App., 594; 95 Ill., 99.

Minnesota Lumber Co. *vs.* Coal Co., 160 Ill., 98.

Pearce *vs.* Foote, 113 Ill., 234.

The General Assembly may by valid enactments—*i. e., by due process of law*—prohibit all things hurtful to the comfort, safety, and welfare of society, even though such pro-

hibition invade the right of liberty or property of an individual.

Town of Lake View *vs.* Rose Hill Cem. Co., 70 Ill., 191.

Magner *vs.* People, 97 Ill., 320.

18 Am. & Eng. Encyc. Law, 739, 740.

With the wisdom, policy, or necessity for such enactments courts have nothing to do.

Booth *vs.* People, 186 Ill., 43.

Laws whose purpose and tendency are to suppress gambling or other crimes are constitutional.

Crandall *vs.* White, 164 Mass., 160.

Where a law operates alike upon all persons and property similarly situated it is not obnoxious to any constitutional provision guaranteeing equal protection to all persons and classes of persons.

Barbier *vs.* Connolly, 113 U. S., 32.

Soon Hing case, *id.*, 709.

Railway Co. *vs.* Hunnes, 115 U. S., 513.

Hayes *vs.* Missouri, 120 U. S., 68.

R'y Co. *vs.* Mackey, 127 U. S., 205.

R. R. Co. *vs.* Herrick, *id.*, 210.

Walston *vs.* Nevin, 128 U. S., 578.

Magoun *vs.* Bank, 170 U. S., 293.

It is not required the statute shall embrace all kinds of personal property, whether such kinds are the usual subjects of option dealings or not.

State *vs.* Gritzner, 134 Mo., 512.

It is sufficient if the statute embrace those subjects most generally used for the application of option contracts for gambling purposes; and of such subjects the court will take cognizance as a matter of common knowledge.

ARGUMENT.

It is urged by counsel for plaintiff in error that because the act under which the conviction in the case at bar was had, by its terms, prohibits the doing of an act which may in itself be innocent, therefore the law is contrary to that provision of the Constitution which commands that no person shall be deprived of life, liberty, or property without due process of law.

The General Assembly has full authority to pass all laws of a general character whose purpose and tendency are to suppress gambling. "Due process of law" is "the law of the land." The law in question is general, applies to all persons and property similarly situated. Its purpose is to suppress gambling and the doing of certain things that have a tendency to disguise or cover up gambling, and to lead to the unlawful practice, and it is "the law of the land." As said by Mr. Chief Justice Boggs in the opinion of the supreme court of Illinois in this case (186 Ill., 43):

"The State inherently possesses and the General Assembly may lawfully exercise such power of restraint upon private rights as may be found necessary and appropriate to promote the health, comfort, safety and welfare of society."

And this even though the prohibition invade the right of liberty or property of an individual. Also, "Laws for the suppression of all forms of gambling have without exception,

so far as we are advised, been regarded by the courts and law-writers as a proper exercise of the police power."

It not infrequently happens that the good citizen must surrender an innocent (to him) right for the promotion of the general welfare. The police power is not limited to the subject of the health and safety (in its usual sense) of the public.

The comfort and general welfare of others must be regarded. It establishes nothing to say the accused in the case at bar actually accepted and paid for the grain specified in the option denounced. It will be conceded, "corners" in the grain market are obnoxious to the general welfare, and that laws prohibiting them may be enacted.

It is matter of common knowledge—and such common knowledge to those familiar with the business that this court and all other courts having to deal with the subject will take cognizance of the fact without proof—that the purchase of options aids in establishing "corners." It takes so much grain out of the market, if a *bona fide* contract, as effectually as if the grain was actually bought and paid for. The object can thus be accomplished with far less capital. It is another matter of common knowledge, also, that the buyer of options and the one who seeks to establish a corner often buys the grain at the expiration of the option to prevent its being put upon the market and thus break the price. If the buyer has 1,000 options he may actually execute the purchase in 400 for the greater profit he can make in the other 600. Or he may execute all of them by reason of the advantage they have given him, though not his intention in the first instance, for the gain he can make in other deals.

The dealing in options is a "gigantic evil," and it cannot be suppressed, and it will be to the great injury of the State, if the legislature may not pass and the executive authorities enforce the very salutary law now in question.

To suppress evil the individual for his own liberty must yield some rights which but for the public welfare he might otherwise exercise. If it be conceded that in an actual option contract for the purpose of obtaining the subject of the contract there is no wrong, still the occasions for the exercise of that right are so few and the injury (if any) to the individual is so slight that he may well be required to surrender that right that the general welfare may be enhanced.

But the option contract itself can be but a mere wager, in the case at bar, on the price of the grain. Using sophistry as argument cannot change this fact. The purchaser can go on the market and purchase the grain at any time. It is only a question of price. It is pure gambling in the price of grain, and is properly designated by the court a "pernicious evil." There is no occasion for him to pay a price for the option except as a wager on the price. If the price does not change, he can purchase the grain and save to himself the price paid for the option. As shown by the very cases cited by counsel for appellant in the large deals supposed by him, the only purpose of those options is to guard against change in prices, or perhaps with a view of making double profit. They are not made because the dealer wants the grain. In the instances cited the dealer has a large quantity of grain to be sold in one market, and his purchase or sale of options in another market is simply a wager on the price with the expectation that if he loses in

one place he will make in another, or if his confidence is great the deal may be made with the expectation of profit in both markets.

The only effective legislation to prevent gambling in options is a law which prohibits or punishes *all* dealing in options. To say that the law shall be so framed that the prosecutor must enter into and make proof of the workings and intentions of the inner mind of the accused farther than is shown by the act itself which he commits, before he can be convicted, is to say there can be no prohibition of or punishment for dealing in options. As an act within itself, the buying or selling an option is even more meretricious than the actual contract to buy or sell in the future. In the latter case a price is fixed, and there is no uncertainty what shall be paid or received on settling day when the property is delivered. In the former case is no certainty of sale or purchase. From the very nature of the contract, the purchaser risks the amount he pays for the option. If he buys, he must pay the amount paid for the option, in addition to the price of the commodity. If he does not buy, he must lose the amount paid for the option. It requires no superior wisdom to know that if the price goes below the option price, the purchaser will not buy under the option, but if he desires the goods, will purchase elsewhere. In every such case he gambles his option payment against the chance of the rise or fall of the market risked by the opposite party.

Counsel for plaintiff in error seem to argue from a false basis, or to confuse dealing in options with the right of the owner of property to contract to sell and deliver that property for delivery in the future. The right to sell

the property inheres in the right to the property itself. Selling an option is merely taking so much money for giving to another the privilege to exercise in the future—contingent upon the chance of the price going up or down—a right to buy or sell, which right exists in the present without any element of chance in its exercise. To prohibit the evils of option dealing the legislature may prohibit all option dealing. It is the most flagrant of all forms of gambling in grain or stocks.

There may be nothing inherently wrong in a person having in possession a slot machine or other gambling device made for gambling purposes. And yet the law which prohibits having such in possession and imposes a penalty for its violation has been sustained, even though there is no proof that the possessor had used or intended to use the same for gambling purposes.

Bobel vs. People, 173 Ill., 19.

The existence of the device with its tendency to encourage gaming is prohibited.

Why not, then, prohibit the dealing in options and the tendency to gaming that may be fostered by it?

The law prohibiting the buying or selling of options is not more objectionable than the law which prohibits a person from selling real or personal property and giving therewith to the purchaser a number giving him the chance to draw some other valuable thing, usually called a "prize." This constitutes a lottery and is unlawful, even though the property may be sold at its fair or usual market price. Such laws are upheld by all the courts, though it may be said as to them, with as much force as in the present case,

that the owner has the right of property and may sell it on any terms he pleases. This must be subject to salutary laws.

We submit that it is within the province of the legislature, without doing violence to the Constitution, to pass laws prohibiting the doing of acts not inherently unlawful which lead to or which may be used to foster and conceal gambling and which may be so done as to constitute gambling.

We most respectfully ask a careful consideration of the opinion of the supreme court of Illinois, delivered through Mr. Chief Justice Boggs, in the case at bar, and reported in 186 Ill., at page 43, and that the judgment of that court be affirmed.

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